

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

VS.

NO. 3:92CV039-D-D

\$15,020.00 IN UNITED STATES CURRENCY

DEFENDANT

MEMORANDUM OPINION

This cause comes before the court upon several of the defendants' motions for various requested relief. The court is of the opinion that the motions are not well taken and shall deny them.

I. DISMISSAL OF FORFEITURE

Upon consideration of the present motion to dismiss, the court finds that it would be more aptly titled as a motion for immediate return of seized property pursuant to Federal Rule of Criminal Procedure 41(e).¹ Insofar as it may be construed as such a motion, the court is of the opinion that it should be denied as cumulative. The defendants previously filed a Rule 41(e) motion in a related case requesting the release of the same property under the same premises raised in the present motion under consideration. United States v. Donnie Howard McPhail, Cause No. 3:92CR44-D (N.D. Miss.) (Motion for Immediate Return of Property). As the requested relief would be the same under either motion, the court does not find it necessary or consistent with judicial economy to construe the present motion also as a Rule 41(e) motion.

However, as the defendants are not professional scriveners and filed the motion *pro se*, the court shall consider the motion as it would any typical motion to dismiss. A Rule 12(b)(6) motion is disfavored, and it is rarely granted. Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986); Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981). In deciding a motion to dismiss under Rule 12(b)(1) or (6), the district court accepts as true those well-pleaded factual allegations in the complaint. C.C. Port, Ltd. v. Davis-Penn Mortgage Co., 61 F.3d 288, 289 (5th Cir. 1995). "Taking the facts alleged in the complaint as true, if it appears certain that the plaintiff cannot prove any set

¹Indeed, on the face of the motion the defendants employed that very language, labeling their motion as one for the immediate release and return of all seized property.

of facts that would entitle it to the relief it seeks," dismissal is proper. Id. It must appear beyond doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995) (alterations and citations omitted). "However, 'the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.'" Id. (quoting 3 Wright & Miller, Federal Practice & Procedure: Civil 2d 1216, pp. 156-59).

On the other hand, dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Even if it appears an almost certainty that the facts alleged cannot be proved to support the claim, the complaint cannot be dismissed so long as the complaint states a claim. Clark, 794 F.2d at 970; Boudeloche v. Grow Chem. Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984). "To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief." Clark, 794 F.2d at 970; see also Mahone v. Addicks Util. Dist., 836 F.2d 921, 926 (5th Cir. 1988); United States v. Uvalde Consol. Indep. Sch. Dist., 625 F.2d 547, 549 (5th Cir. 1980), cert. denied, 451 U.S. 1002. If a required element, a prerequisite to obtaining the requested relief, is lacking in the complaint, dismissal is proper. Id. See also Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995) ("Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."). While dismissal under Rule 12(b)(6) ordinarily is determined by whether the facts alleged, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings. Clark, 794 F.2d at 970; Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105.

Furthermore, Rule 12 states that

[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to

present all material made pertinent to such a motion by Rule 56. Fed. R. Civ. P. 12(b). Nevertheless, district courts are "permitted to refer to matters of public record when deciding a 12(b)(6) motion to dismiss." Davis v. Bayless, 1995 WL 692991, *7 n.3 (5th Cir.) (citing Cinel v. Connick, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994)). Even though affidavits might be present in the record, the court is not required to treat the motion as one for summary judgment if it does not rely upon such documents. Id.

In the present action, the court cannot hold that the plaintiff has failed to state a claim upon which relief may be granted. In fact, this court previously denied the defendants' Motion for Summary Judgment in this cause. United States v. \$15,020.00 in United States Currency, Cause No. 3:92CV39-D (N.D. Miss. Nov.7, 1996) (Order Denying Motion for Summary Judgment). The government's Verified Complaint for Forfeiture In Rem clearly has an adequate basis in the law for relief under the facts as alleged and the motion to dismiss is not well taken and shall be denied.

II. REQUEST FOR JURY TRIAL

The defendants have also requested that this matter be tried by a jury. Rule 38 of the Federal Rules of Civil Procedure govern the procedures to be utilized by parties when demanding a jury trial. In relevant part the rule provides:

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

Fed.R.Civ.P. 38(b). The plaintiff filed the complaint on March 31, 1992; the defendants filed their verified answer on April 21, 1992; no other pleadings as defined by the Rules have been filed;² the

²Rule 7 of the Federal Rules of Civil Procedure sets out the pleadings allowed and the form of motions. Under subsection (a) which addresses pleadings, the rule provides:

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such, an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party

defendants filed their motion for a jury trial on July 21, 1994. Rule 38 goes on to state that a party waives his right to a trial by jury when he fails to "serve and file a demand as required by this rule." Fed.R.Civ.P. 38(d). The defendants tarried over two (2) years after the filing of the last pleading in this action before demanding a jury trial. The court is of the opinion that such dilatory action constitutes a waiver of a jury trial as prescribed by the rule and relevant case law and the motion for a jury trial shall be denied. Matter of Tex. General Petroleum Corp., 40 F.3d 763, 772 (5th Cir. 1994); Guajardo v. Estelle, 580 F.2d 748, 752-53 (5th Cir. 1978).

III. APPOINTMENT OF COUNSEL

Unless there are "exceptional circumstances," a district court is not required to appoint counsel to represent indigent plaintiffs in a civil action. Branch v. Cole, 686 F.2d 264, 266 (5th Cir. 1982); see also Feist v. Jefferson County Commissioners Court, 778 F.2d 250, 253 (5th Cir. 1985). The court has reviewed the factors set out in Ulmer v. Chancellor, 691 F.2d 209, 212-13 (5th Cir. 1982), and has determined that no exceptional circumstances exist in this action so as to warrant appointment of counsel. This motion of the defendants shall also be denied.

IV. REMISSION OR MITIGATION OF FORFEITURE

On April 21, 1992, the defendants filed a Petition for Remission or Mitigation of Forfeiture. The ground asserted within the petition by the defendants as the basis for relief is that the funds rightfully belong to the defendants as proceeds from cattle sales. As its grounds for forfeiture, the government asserts that the funds are proceeds of marijuana sales for which the defendants were convicted. United States v. Donnie Howard McPhail, Sarah Trilby McPhail, Lou Carolyn McPhail, Criminal No. 3:92cr044 (N.D. Miss., Aug. 5, 1992) (Judgment of Conviction). Although the motion is labeled as a petition for remission or mitigation, the relief requested within the motion is for the full return of the funds to the defendants. Thus, the court construes the petition more in the manner of a motion for summary judgment. In that the defendants have failed to demonstrate that there exist

answer.
Fed.R.Civ.P. 7(a). "The last pleading in Rule 38 usually means an answer or a reply to a counterclaim." Matter of Tex. General Petroleum Corp., 40 F.3d 763, 772 (5th Cir. 1994).

no genuine issues of material fact concerning the rightful ownership of the funds in question, the court is of the opinion that the petition should be denied.

V. MOTION, CLAIM, PROPERTY, AND 28 U.S.C. § 2255

On January 13, 1995, the defendants filed with the court a document entitled "Motion, Claim, Property, and 28 U.S.C. § 2255." From what can be gleaned after a thorough reading of the contents of the *pro se* motion, the court is of the opinion that the defendants are requesting the "release" of their seized property on the basis of ineffective assistance of counsel. This motion is not well taken and shall be denied. The right to effective assistance of counsel is dependent upon the right to counsel itself. Evitts v. Lucey, 469 U.S. 387, 397 n.7, 105 S. Ct. 830, 387 n.7, 83 L.Ed.2d 821 (1985) The Sixth Amendment right to effective assistance of counsel only attaches if the matter involved is a criminal one. Evitts, 469 U.S. at 395, 105 S. Ct. at 386. The present action concerns a **civil** forfeiture which does not impinge upon the constitutional right to effective assistance of counsel. Sanchez v. United States Postal Serv., 785 F.2d 1236, 1237 (5th Cir. 1986). Thus, the motion shall be denied.

VI. MISCELLANEOUS RELIEF

On July 5, 1996, the defendants filed a letter motion requesting miscellaneous relief in three actions, including the case *sub judice*, pending before courts in the Northern District of Mississippi. As it pertains to this action, the court construes the motion as one requesting a continuance of the trial. On July 9, 1996, the undersigned granted a previously filed motion for continuance, thus mooting the July 5 request. On that basis, it shall be denied.

CONCLUSION

After thoughtful consideration of the defendants' Motion for Dismissal of Seized Forfeiture Personal Property Or a Jury Trial and Appointment of Counsel, the court is of the opinion that it should be denied. The defendants failed to demonstrate that they are entitled to a dismissal as a matter of law. Furthermore, the court is of the opinion that the defendants have waived their right to a jury trial and are not entitled to court-appointed counsel. In that the facts surrounding the

origination of the funds in question are disputed, the court shall deny the defendants' Petition for Remission or Mitigation of Forfeiture. The defendants do not enjoy a Sixth Amendment right to effective assistance of counsel in this civil forfeiture matter and their Motion, Claim, Property, and 28 U.S.C. § 2255 shall be denied. As the court previously granted a continuance after the defendants filed their letter motion requesting the same relief, the court shall deny the letter motion as moot.

A separate order in accordance with this opinion shall issue this day.

THIS ____ day of November 1996.

United States District Judge

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DEFENDANT

ORDER

Pursuant to a memorandum opinion issued this day, the court upon due consideration of the defendants' motions does not find them well taken and they shall be denied.

Therefore, it is ORDERED that:

1) the defendants' Motion for Dismissal of Seized Forfeiture Personal Property Or a Jury Trial and Appointment of Counsel be, and it is hereby, DENIED.

2) the defendants' Petition for Remission or Mitigation of Forfeiture be, and it is hereby, DENIED.

3) the defendants' Motion, Claim, Property, and 28 U.S.C. § 2255 be, and it is hereby, DENIED.

4) the defendants' letter motion for a continuance be, and it is hereby, DENIED AS MOOT.

All memoranda, depositions, affidavits and other matters considered by the court in denying the defendants' motions are hereby incorporated and made a part of the record in this cause.

SO ORDERED this ____ day of November 1996.

United States District Judge